Supreme Court, U.S.
FILED
OCT 7 1988
CLERK

No. 88-28

In the Supreme Court of the United States

OCTOBER TERM, 1988

CYRIL ONWUASOANYA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends that court of appeals erred in holding that he could not file a motion under Fed. R. Crim. P. 41(e) for the return of property that was seized in aid of a civil forfeiture under 21 U.S.C. (& Supp. IV) 881. However, petitioner's motion for return of the property is now moot, because the United States has decided not to seek forfeiture of the property and therefore is returning the property to petitioner.

1. On March 19, 1987, a United States Magistrate in the District of Columbia issued a warrant for the seizure of funds in petitioner's account with the Perpetual American Bank. The warrant was in aid of a civil forfeiture, pursuant to 21 U.S.C. 881(a)(6). The application for the seizure warrant alleged that the contents of petitioner's bank account—$11,787.69—were the proceeds of or were intended to be used for illegal drug trafficking. The office of Perpetual American Bank identified in the application and the warrant was located in Alexandria, Virginia. See Pet. App. 9a.[1] The warrant was served on the Alexandria office of the bank on March 19, 1987. On March 26, 1987, the bank sent a cashier's check for the amount in petitioner's account to the DEA office in Washington, D.C. (C.A. Mot. for Summary Reversal, Exh. 2). In his Rule 41(e) motion, filed on April 9, 1987, petitioner argued that the federal magistrate in the District of Columbia did not have authority to issue a warrant for the seizure of assets that were located in Virginia, because Rule 41(a) provides that a warrant may be issued "by a federal magistrate * * * within the district wherein the property is located" (C.A. Mot. for Summary Reversal, Exh. 3). Without requesting a response from the government, the district court, by order dated April 13, 1987, denied petitioner's motion, explaining that the attachment was made on a bank located in the District of Columbia that had branches in other locations (Pet. App. 5a).

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[1] The application for the warrant and the supporting affidavit of Detective Dwight Rawls were attached as Exhibit B to the United States' Opposition to Motion for Summary Reversal in the court of appeals.

Petitioner then appealed and sought summary reversal of the district court's order. The court of appeals did not reach the merits of the validity of the warrant. Instead, it held that petitioner could not invoke the remedy afforded by Fed. R. Crim. P. 41(e), and it therefore dismissed the appeal (Pet. App. 1a-4a). The court of appeals noted that, as petitioner conceded, "[t]his case is not one where a defendant's property was seized for use in a criminal prosecution," to which Fed. R. Crim. P. 41 concededly would be applicable (Pet. App. 4a). Rather, "[t]he statutory authority relied on by the government in seeking the warrant and by the magistrate in issuing the warrant was the civil forfeiture provision of 21 U.S.C. § 881" (Pet. App. 4a). The court held that Fed. R. Crim. P. 41(e) is unavailable in such a case, because Fed. R. Crim. P. 54(b)(5) expressly provides that " 'these rules [*i.e.*, the Federal Rules of Criminal Procedure] are not applicable to * * * civil forfeiture of property for violation of a statute of the United States' " (Pet. App. 3a, quoting Fed R. Crim. P. 54(b)(5) (material in brackets added by the court)). In a footnote, the court of appeals acknowledged this Court's statement in *United States* v. *$8,850*, 461 U.S. 555, 569 (1983), that a motion under Rule 41(e) would lie where the claimant wished to challenge the legality of the seizure. But the court of appeals concluded that the Court's statement was dictum because the Court had not directly confronted the situation in this case, "where the seizure is admittedly pursuant to a civil forfeiture action" (Pet. App. 3a n.1).

2. In the meantime, after the district court denied petitioner's motion for return of the property under Rule 41(e), DEA instituted administrative forfeiture

proceedings pursuant to 21 U.S.C. 881(d) and 19 U.S.C. (& Supp. IV) 1607. On June 5, 1987, DEA notified petitioner of those proceedings and of his right to contest the forfeiture in court by filing a claim of ownership and bond with DEA (Pet. Supp. Br. Attachment A).[2] On June 16, 1987, petitioner responded by filing a claim of ownership, stating that he wished to contest the forfeiture in the United States District Court for the District of Columbia (Pet. Supp. Br. Attachment C). The claim of ownership was accompanied by a request to proceed in forma pauperis, and thereby to be excused from the requirement that he post a bond as a condition of contesting the forefeiture in court (Pet. Supp. Br. Attachment B). We have been informed that DEA forwarded the case to the Office of the United States Attorney for the District of Columbia on September 30, 1987, for institution of civil forfeiture proceedings.

By letter dated September 20, 1988, the United States Attorney's Office informed DEA that it had declined to file a civil proceeding for the forfeiture of the funds seized from petitioner's bank account. In response to that letter, DEA on October 6, 1988, sent a letter to the local DEA office instructing it to return the funds to petitioner. A copy of that letter was sent to the United States Marshal, who has custody of the cashier's check. Petitioner's motion under Fed. R. Crim. P. 41(e) seeking a judicial order compelling return of the property therefore is moot.

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[2] "Pet. Supp. Br." refers to the supplemental brief filed by petitioner in support of his petition for a writ of certiorari on September 16, 1988.

It therefore is respectfully submitted that the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand with instructions to dismiss the proceedings arising out of petitioner's Rule 41(e) motion as moot. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 38-39 (1950).

CHARLES FRIED
Solicitor General

OCTOBER 1988

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